No. 83-2065

IN THE

SUPREME COURT OF THE UNITED STATES

TERM: OCTOBER 1983

ROLAND A. JONES,

PETITIONER,

v.

DEPARTMENT OF HUMAN RESOURCES (DHR), STATE OF GEORGIA, et al.,

RESPONDENTS.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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ADMINISTRATIVE REASONS FOR DISALLOWING RESPONDENTS OPPOSITION

As is the fact in my case of respondents not following their own rules and regulation, respondents have not abided by the U. S. Supreme Court Rules. Respondents opposition must be disallowed for one or all of the following administrative reasons:

1. They have not made a timely filing within 30 days after receipt of my petition (Rule 22.1).

2. They have not shown proof of timely filing with notarized statement setting forth the details of the mailing to the Court: the required statement that "to his knowledge the mailing took place on a particular date (Rule 28.2) was not included; therefore, it is not timely filed for a second time, and not typed "pica" style (Rule 33.1 (c)). .

3. Both of respondent arguments (A and B) are stated as arguments for dis-

missal of my petition. Rule 22.3 plainly states that no such dismissal requests will be received by the Court. It must be dismissed as not having merit per Rule 33.7, but retained as a reference for the points herein.

LEGAL REASONS FOR DISALLOWING RESPONDENTS OPPOSITION

The respondents Brief in Opposition is vaguely asserted and based on an ill-defined, abstract notion (See Wieman, page 12, herein) and rationale to distract attention away from a pattern of internal discrimination within the Department of Human Resources (See Whittaker v. Department of Human Resources, Ex "I" and Kennedy v. Crittenden (DHR), page 10-14 and Ex "J", my 11th Circuit Petition for Rehearing, dated March 7, 1984, on file with the Clerk, U. S. Supreme Court) and for not providing relief.

The response is irrelevant because it does not address the questions placed

before this Court. They argue an abstract and irrelevant issue of Bishop v. Wood and property v. liberty when the issue of my petition is a "harsh fact" of discrimination, an unjustified and unwarranted termination, and my entitlement to the benefits of discrimination law:

1. Whether or not there was unfair discriminatory treatment because of race, and/or was there an ambiguous, arbitrary, capricious involuntary separation and grievance procedures in effect for me, as a black, that could be related to a pattern of being in effect for blacks throughout the Department of Human Resources (See page 10-14, Exs "B", "C", and "D", my 11th Circuit Petition for Rehearing, dated March 7, 1984, on file with the Clerk, U. S. Supreme Court?

2. Whether or not there was discriminatory interpretation and application of Georgia Law and/or Merit System policies and rules and regulations?

3. Whether or not there was capricious interpretation and application of Georgia Law and/or Merit System/DHR policies and rules and regulations?

4. Whether or not there was erroneous interpretation and application of Georgia Law and/or Merit System policies and rules and regulations?

5. Whether or not there was operating of the system for terminations was wholly subjective?

On page 6 of the Brief in Opposition the respondents cite Whittaker v. State of Georgia Dept. of Human Resources (DHR) as an authority for terminating working test employees; however, respondents failed to mention that the conclusions of law in Whittaker v. DHR points up a major flaw in their rationale for the abstract use of Bishop v. Wood as their polestar justification for working test employee dismissals; it is also major case in support of my claim that Bishop v. Wood

and its related property interest arguments are irrelevant, abstract, and foreign to the issues of discrimination before this Court; it also points up an issue of there being no uniformity in decisions concerning working test employees in the Northern District of Georgia; and it highlights the fact that there was a misapplication of precedents when the Northern District Court considered my case, as a working test employee, and did not apply the same factors of the working test employee case of Whittaker since the Whittaker case was against the same Georgia State DHR, and the case was in the same District Court system.

In Whittaker the Northern District of Georgia did not consider Bishop v. Wood and/or property/liberty interest. The District Court, however, allowed for (See Exhibit "I", at 933, my 11th Cir. Petition for Rehearing, dated March 7, 1984,

on file in the Office of the Clerk, U. S. Supreme Court):

a. "that [Whittaker, a working test] plaintiff could challenge either employment practices...or policies affecting working test employees" [in the DHR].

b. "that the [working test] plaintiff would have full opportunity to explore the allegedly discriminatory system-wide employment practices."

(See also pages 10-13, and EXs "B","C", "D", and "J", my 11th Cir. Petition for Rehearing, dated March 7, 1984, on file in the Office of the Clerk, U. S. Supreme Court for DHR coregligionist discrimination provided by the Middle District of Georgia Court System).

The 14th Amendment is extended to "persons" by Bakke, and "persons" have property and liberty rights. Bakke corrected the Bishop, Roth paradox for minorities all minorities, probationary or otherwise classified:

"The guarantees of equal protection cannot mean one thing when applied to one individual and something else

when applied to a person of another color." (University of California Regents v. Bakke 438 U.S. 265 (1978)).

A minority employee does not relinquish his rights and the benefits of general law when crossing the employment threshold of State of Ga.

Firing a working test employee can only be for inadequate job performance and only at the end of the working test.

I was fired to eliminate any further opposition to a hiring of a white from outside as the Director of Management Information; respondents are correct in stating at page 18 that there was "dissatisfaction" with the personnel [hiring] decision. Probationaries may not be fired for such expressions per Tygrett and 704 (a), Title VII.

Chief Judge Godbold agrees:

> "When he (Jones) informed his supervisor that this treatment violated the department's regulations, he received no relief. He continued to press his claim as well as other objections to his working conditions, and was fired in October

1981".

On page 21 of the Brief in Opposition it is stated that "When a public employee is not retained after completing a probationary period and his position is terminable at will...". The Court is reminded that Petitioner was fired before the completion of the probationary period and 18 days after I stated my claim (See para 30, page 36, Appendix D, Record of Appendices and Ex "G" and "H" 11th Cir. Record of Excerpts for Appellant's Reply, dated October 4, 1983 on file with the Clerk, U. S. Supreme Court) continued to "press my claim".

In Tygrett v. Washington, D.C., Cir. No. 1392-72, October 23 (1974), a probationary policeman with the District of Columbia police department was fired after being reported as having made statements in favor of a "sick-in."

The 11th Cir. erred by not ruling in favor of petitioner per the Court of

Appeals note in Tygrett:

"[Probationary] Policemen, like teachers, and lawyers, [and also minority work test employees], are not relegated to a watered-down version of constitutional rights."

"He could not, however, be banished from the force "on a basis that infringes his constitutionally protected interests - especially his interest in freedom of speech." (e.g. Petitioner's 704 (a)).

Certainly an employee cannot be discharged for protected (e.g. 704 [a], Title VII) speech. Even if the speech were unprotected, he cannot be discharged unless it is for good cause shown.

If one looks at the Tygrett decision closely you can see that the speech there lacked any nexus to efficiency of the service since there was no showing that "the speech in question adversely affected his efficiency as a [probationary] police officer or the efficiency of the Department as a Police force."

Nexus concepts extend into constitutional rights areas such as free speech. They are indeed the overlay to all areas

of personnel law. Thus, the First Amendment and nexus cases also demonstrate the increased emphasis on constitutional rights.

One central issue in my petition is that the firing was in violation of Sections 703 and 704, Title VII and there are some 38 State Merit System Rules that provide PETITIONER courses of action for remedies within the State Merit System prior to a dismissal (See pages 20 and 51 of my PETITION FOR WRIT OF CERTIORARI). Respondents refused to follow the majority of their own rules which permitted filing of a grievance and appeals (See Appendix "F" Record of Appendices).

In Accardi v. Shaughnessy, 347 U. S. 260 (1954); Service v. Dulles, 354 U. S. 363, 372 (1957) "regulations validity prescribed by a government administrator are binding upon him as well as the citizen, and this principle holds even when the administrative action under review is

discretionary in nature."

Cleveland Board of Education v. Lafleur (414 U.S. 632, 1974) establishes that administrative convenience cannot validate arbitrary rules.

In Monroe v. Pope, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2 492 (1961). The Court identified three purposes:

> 1. The overriding of particular state laws; 2. The provision of a remedy when state law was inadequate; and 3. The creation of a federal remedy when the state remedy, though adequate in theory, was not available in practice.

On page 16 of respondents response they state the inadequacy of state law:

> "as a matter of State law, a working test employee may be dismissed...at any time...and has no right to seek relief pursuant to the appeal"

If this is true then why (See page 75, MY RECORD OF APPENDICES, Rules 1, 3 to 6, 8, 10, 12 to 33) would so many rules state just the opposite?

And, to further demonstrate the inadequacy of Georgia State Law when compared to the Georgia at-will law stated

by respondents as justification for terminations, GA. LAW, 1975, Section 7. Adverse Actions, Appeals and Hearings is clear and does not differentiate between the applicability of the law to different classes of employees and it does not exclude minority probationary employees:

> "NO (emphasis supplied) employee of any (emphasis supplied) department who is included under this Act or hereafter included under its authority and who is subject to the rules and regulations prescribed by the State Merit System MAY BE DISMISSED from said department or OTHERWISE ADVERSELY AFFECTED as to COMPENSATION OR EMPLOYMENT STATUS EXCEPT FOR GOOD CAUSE..."

And, SECTION 703(a), Title VII is very clear:

> "It shall be an unlawful employment practice... (2) to limit, or classify his employees [working test] or applicants for employment in any way which would deprive or tend to deprive [any minority working test employee of rights, as desired and stated by respondents at page 16] any individual of employment opportunities or otherwise adversely affect his status as an employee..."

In Wieman v. Updegraff, 344 U.S. 183, 192 (1952), the Supreme Court noted:

"We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to statute is patently arbitrary or discriminatory."

And in Scott v. Macy, 349 F. 2d 182, 183-4 (D.C. Cir 1965) and Norlander v. Schleck 345 F. Supp. 595 (D Minn. 1972) it has been held that an applicant for public employment is not without constitutional protection. The Constitution does not distinguish between applicants and employees; both are entitled like other people, to equal protection against arbitrary and discriminatory treatment by the government.

To the original review for procedural regularity, the standard added by which courts examine the executive action to determine whether it was "arbitrary or capricious", McCarthy v. Philadelphia Civil Service Commission - U.S., March 22, 1976' (Shapiro v. Thompson, 394 U.S. 618 (1969); Cleveland Board of Education

v. LaFleur, 414, U.S. 632 (1974); Cohen v. Chesterfield County, 474 F 2d 395 (1973)' Sugarman v. Dougall, 413 U.S. 634 (1973)' See e.g., Truas v. Raich, 239 U.S. 33 (1915); Takahaski v. Fish - Game Commission, 334 U.S. 410 (1948); Sugarman v. Dougall, supra; Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973) 2nd Report, U.S. Civil Ser. Comm. 83 (1885).

Respondents are incorrect when stating at pages 7 and 20 their "discretionary" authorities, and that managerial discretion is "at-will", at pages 16, 20, 21.. A manager can be sued and required to stand trial to demonstrate that discretionary nature of his position and the good faith. Monge v. Beebe Rubber Co., New Hamp. Supreme Court 1974 and those below:

"A termination by the employer of a contract of employment at will which is motivated by bad faith or malice, or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract."

In the United States v. Park the Supreme Court said:

> "... employees who execute the organizational mission have a positive duty to seek out and remedy violations of the laws when they occur and a further affirmative duty to ensure the violations do not occur."

In Wood v. Strickland, 420 U. S. 308, 95 S. Ct. 992, 1975 this Court set forth the formulation for judging actions and damages taken while discharging his official responsibilities:

> "...if he knew or reasonably should have known that the action he took within the sphere of his official responsibility would violate the constitutional rights of the (individual) affected or if he took the action with malicious intention to cause a deprivation of constitutional rights or injury to the (individual)." 85 S. Ct. at 1001.

In De Grace v. Rumsfeld, 614 F.2d 796 (1980) The court found that management had not satisfied its obligation to correct the conduct, and that even if the base commander's motive was pure, this would not insulate defendants from their

failure to correct the racially offensive conduct:

> "An employer may not stand by and allow an employee to be subjected to a course of racial harassment by co-workers, and thus defendants must accept responsibility for their supervisors' derelictions if such existed, in responding to the racial problem [at the base]."

In Williams v. Codd, 459 F. Supp. 804 (S.D.N.Y. 1978), 42 U.S.C.A. 1983, a plaintiff need only show as minimum:

a. deprivation of due process, that is, deprivation of the fundamentals of fair play;

b. discrimination, e.g., discrimination on the basis of race or religion; or

c. clearly unreasonable, arbitrary, or capricious action. See Estrban v. Central Mississippi State College, 415 F. 2d 1077 (1979); and, it is not necessary to find that the defendants had any specific intent to deprive the Plaintiff of his civil rights (see Pierson v. Ray, 386 U.S. 547 (1967); Roberts v. Williams, 456 F. 2d (5th Cir. 1971); Whirl v. Kern, 407 F 2d 781 (5th Cir. 1968); Skehan v. Board of Trustees, 538 F.2d 53 (3rd Cir. 1976 (en banc)) Navarette v. Enomoto, 536 F. 2d 277 (9th Cir. 1976).

Under the Vitarelli doctrine, of Vitarelli v. Seaton, 359 U.S. 535 (1959), the employee must be given the greatest procedural protection to which he is

entitled under any possible regulatory standards. See Cole v. Young, 351 U.S. 536 (1955). Accord: Slowich v. Hampton, 470 F 2d 467 (D.C. Cir. 1972); O'Shea v. Blatchford, 346 F. Supp. 742 (S.D.N.Y. 1972); Massman v. Secretary of Housing and Urban Development, 332 F. Supp. 894 (DDC 1971).

A decision to fire must be based on an official finding of inadequate performance when there is an expectation of continued employment, and where there was an expectation of continued employment, as a minimum, to the end of the "probationary period of six months: That if Plaintiffs who have had a property interest because of an "expectation of continued employment and absent an official finding of inadequate performance" are due rights, thus, a "probationary" employee is ENTITLED THE SAME OFFICIAL FINDING STANDARD including an "expectation in continued employment" absent an

official finding of inadequate performance.

On page 22 respondents assert that "the ultimate control of State personnel relations is, and should remain, with the State"; however, respondents did not consider:

> "A proper balance between freedom of expression and discipline in government service should not unreasonably restrain expressions of opinion and should permit and encourage full inquiry into allegations of racial and religious discrimination." Murphy v. Facendra, 307 F. Supp. 353 D. Colo. 1969. See also Ianarelli v. Morton, 327 F. Supp. 873 (E.D. Pa. 1971) affd. 463 F 2d 179 (3rd Cir. 1972).

CONCLUSION

Rejecting a claim regarding discriminatory actions on basis of respondents vaguely asserted and ill-defined abstract notions will represent clear error of law and fact. Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983).

Respondent reasoning at page 24 that "...even if ill-advised, [personnel decisions are] best corrected by means other than a resort to a federal forum" is

defective. If the State of Georgia is permitted to prevail with an abstract notion of Bishop, Roth, and Pickering it will create havoc by causing a tremendous opening (loophole) in discrimination law, and minorties in the employment of the State of Georgia will be made to suffer.

While respondents rules an regulations allow for filing of a grievance within the DHR and State of Georgia Merit System, the system of white supervisors foreclosed on these rights with a rushed termination.

In view of all of the rules and regulations available to Petitioner for appeals and grievances, respondents, by their actions in this case, have already proven that access to their own internal forum is an exercise in futility, capriciously made impossible by the design of the white DHR supervisors (See pages 75-86, Appen. "F", Record of Appendices and Exs "E", "F", "D", and "G", my 11th Cir.

Petition for Rehearing, dated March 7, 1984, on file with the Clerk, U. S. Supreme Court). Respondents provided no reasonable justification or evidence for the termination.

In view of the preponderance of discrimination law, the foregoing points/authorities, the number of "protected group working test members" affected, the conclusion is inescapable that I present a case in which conflicting decisions in important questions of discrimination law must be resolved, and the judgment against me overruled. Each defendant should be required to suffer as I have been made to suffer; therefore, compensation and very heavy punitive damages, and expenses must be assessed against each defendant, individually and in their capacities.

Respectfully Submitted,

Roland A. Jones, pro se
Lt. Col. U. S. Army (Retired)

CERTIFICATE OF SERVICE

I certify that I have served 3 copies of the foregoing to counsel of record by hand on this 18th day of October 1984.

Roland A. Jones, pro se
Lt. Col. U. S. Army (Retired)